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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO.209 OF 2006

The Commissioner of Central)
Excise Thane-II having his)
Office at Navprabhat Chambers)
Ranade Road, Dadar, Mumbai-28.)..APPELLANT

VERSUS

1.M/s.Harper Pharmaceuticals (P))
Ltd. No.3,Vimal Industrial)
Estate, Golani Complex, Waliv)
Vasai (E), Dist. Thane.)
2.Shri J. Sarkar, Managing)
Director,)
M/s.Harper Pharmaceuticals (P))
Ltd. No.3,Vimal Industrial)
Estate, Golani Complex, Waliv)
Vasai (E), Dist. Thane.)
3.Shri Partha Ray, Director,)
M/s.Harper Pharmaceuticals (P))
Ltd. No.3,Vimal Industrial)
Estate, Golani Complex, Waliv)
Vasai (E), Dist. Thane.)..RESPONDENTS

Mr.A.S. Rao with Ms. Ritu Singh i/b. Dr. T.C. Kaushik for the Appellant.

Mr. V.Shreedharan with Mr. Pankaj Shah i/b. P.D.S. Legal for respondent No.1.

CORAM: F.I. REBELLO &

J.P.DEVADHAR,JJ.

DATED: 2ND AUGUST, 2007

JUDGMENT (PER F.I. REBELLO, J.):

. This Appeal is admitted on the following question of law:-

> "Whether the CESTAT was right in holding that the demand issued by the Appellant is time barred even though the Appellant herein has brought on record the incontrovertible evidence that there is suppression of material facts by the Respondents and therefore the case of the Appellant does fall under the proviso of S.11A(1) of Central Excise Act?

The relevant proviso to Section 11A reads as under:-

> "**Provided that** where any duty of excise has

> not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provision of this sub-section shall have effect, as if for the words one year, the words "five years' were substituted."

2. To answer the question, a few facts may be set out. A show cause notice was issued to the Respondents by invoking the provisions of Section 11A(1) of the Central Act, 1944. It was the contention of the Revenue in the show cause notice that the respondents were engaged in the manufacture of excisable goods falling under Ch. 30 and 33 of the Schedule to the Central Excise Tariff Act, 1985 and had removed branded goods of various parties without payment of Central Excise duty during the period from 14th May, 1999 to 9th August, 2000 thereby contravening the provisions of the Central Excise Rules and other notification as set out in the notice. It was set out that the petitioner wilfully suppressed the fact of manufacture and removal of goods of branded names with intent to

evade payment of duty of Central Excise and this act of omission and commission is sufficient to invoke the first proviso to the sub-section (1) of Section 11A of the Central Excise Act, 1944.

3. Respondents replied to the show cause notice. The Respondent No.1, it may be mentioned, are manufacturers of P. & P. medicines and room air freshners in the form of "Aerosol Spray. They claim exemption to pay Central Excise duty based on their claim that the goods cleared under 9 consignments in dispute were bearing brand name of the noticees that were eligible for SSI benefit and also that the factory was set up in a Gram Panchayat area. We do not propose to deal with the second contention as the issue was not answered by the Appellate Tribunal and the respondents have not taken steps against the same.

. The Air Freshners cleared by the respondents were having in addition to the printed name of respondent No.1, printed names of other companies, as an illustration of M/s.Cachet Pharmaceuticals Ltd. In addition to words and logos, the aerosol containers were also having a slogan printed "not for sale". The statement of respondent No.3 had been recorded. Additional Commissioner, Central Excise, Thane held against the respondents. The

order recorded that there was sufficient material to invoke the first proviso to sub-section (1) of Section 11A of the Act and in view of that, were liable to pay interest at appropriate rate under the provisions of Section 11AB and also mandatory liable for the penalty to the duty that may be determined under sub-section (2) of Section 11A of the Central Excise Act as provided under Section 11A(c) of the Central Excise Act, 1944 for the acts of omission and commission. Thereafter by a detailed order dated 23rd July, 2004 the learned Tribunal passed various directions against the respondents which included imposition of penalty not only on respondent No.1 but also on respondent Nos. 2 and 3.

4. The respondents aggrieved by the order preferred an Appeal before the Commissioner of Central Excise, who by order dated 31st March, 2005 was pleased to dismiss the Appeal on the ground that the respondents had sold goods with not only the brand name of owner but also the brand name of others. The Appellate Authority also held that so there is no evidence produced by the appellants that subject goods were not sold by brand name owner using their own brand. The Commissioner, Appeals noted that the moot point involved in the instant case is whether the appellant had wrongly availed

the benefit of SSI exemption under Notification No.8/2000 and 8/2001 on their product which bears the brand name of other persons. It was held that the benefit of the Notification is not admissible once the brand name of the other person is used, which is not disputed. The issue of the factory being situated in a village was not answered.

. The respondents thereafter preferred Appeals before the Customs and Excise Appellate Tribunal. The learned Tribunal in so far as the contention urged that the Respondent No.1 established in the Grampanchayat area, did not proceed to answer the issue but held that the show cause notice could not have been issued on the ground of limitation as the respondents had made out a strong case of bonafide belief on their part and accordingly allowed the Appeal and set aside the order of the Authorities below. The Tribunal also noted the judgment of the Supreme Court in Commissioner of Central Excise, Trichy vs. Grasim Industries Ltd. 2005 (183) E.L.T. 123 (S.C.).

6. The issue now can be answered in the context of the questions of law framed, which is restricted to the findings of the Appellate Tribunal that the Respondents could not have invoked the proviso to Section 11-A of the Act.

7. The first question that we have to answer is whether the view taken by the Appellate Tribunal is contrary to the provisions of the Act.. A perusal of the proviso to Section 11A would indicate the following requirements:-

(1) Duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded;

(2) By reason of fraud, collusion or any wilful misstatement or suppression of facts or contravention of any other provisions of the Act and the Rules made thereunder.

(3) With intent to evade payment of duty by such person or his agent.

5. Before answering the issues it must be set out that the position in law was that the Special Bench of the Tribunal had taken a view that the benefit of the notification was available even if apart from the logo of the manufacturer the logo of brand name of the company for whom it was manufactured was also on the container but the goods were not meant for sale. The view taken came up for consideration before the Supreme Court in

Commissioner of Central Excise, Trichy vs. Grasim Industries Ltd. 2005 (183) E.L.T. 123 (S.C.). The Supreme Court on consideration of the Notifications was pleased to hold that the Tribunal had taken a patently erroneous view. and as such it was necessary for the Supreme Court clarify the law so that the erroneous Judgments of the Tribunal do not remain binding precedents. The Court also noted that the judgment of the Tribunal approved to be based upon its own judgment in the case of Astra Pharmaceuticals (P) Ltd. V. Collector of Central Excise, Chandigarh 1995 (75) E.L.T. 214 (S.C.) the Supreme Court also noted that the Tribunal had followed its earlier judgments, reference to which is made in para.2 of the judgment. After reversing the judgment of the Tribunal in the matter of penalty which is imposed the Supreme Court observed as under:-

> "While the conclusions of the Commissioner that the Respondents were not entitled to the benefit of the Notification are correct, the fact still remains that the Tribunal has in a number of matters given an interpretation as understood by the Respondent. It therefore cannot be said that the Respondents could not have taken the view they did. It cannot be said that

> they could never have concluded that they were entitled to the benefit of the Notification. We therefore feel that this is a case where penalty should not be imposed. We therefore delete the imposition of penalty on the Respondents."

8. We may also gainfully refer to the judgment of the Supreme Court in Mentha & Allied Products Ltd. Vs. Commissioner of C.Ex. Meerut, 2004 (167) 494 (S.C.). In that matter the issue before the Supreme Court was whether the imposition of penalty and application of extended period of limitation was not justified. While answering the issue the Supreme Court observed as under:-

> "10. However, so far as the application of Section 11 for the purpose of levy of penalty is concerned, we must take note of the fact that different views have been expressed at different stages both by the Tribunal and the High Court of Bombay in Citric India Ltd. v. Union of India, 1993 (66) E.L.T. 566 (Bom.), and by this Court also in one of the decisions cited above, it is not clear as to whether the law is absolutely clear on the matter or not and the authorities also had to issue

> clarifications from time to time. In the circumstances, we think, invoking of Section 11A is not called for any levy of penalty in the present case would not be appropriate and the application of extended period of limitation is not justified. The order of the Tribunal is modified to this extent. In other respects the order of the Tribunal stands maintained."

In Kohinoor Elastics Pvt. Ltd. vs. Commissioner of Central Excise, Indore, 2005 (188) E.L.T.3(S.C.) the issue involved was the application of notification dated 28th February, 1993.

. From a consideration of the judgments and the ratios of the judgment,s it would be clear that in case where the Tribunal had given an interpretation as understood by the Respondents. The law on the subject was not clear. In such circumstances unless the predicates of the proviso to Section 11A are satisfied, Section 11A cannot be invoked to levy penalty nor could the extended period of limitation as provided under the proviso be applied.

9. As noted by us earlier the application of the proviso would require that the non-payment of

excise duty had to be by reason of fraud, collusion or any wilful misstatement or suppression of fact or contravention of any other provisions of the Act or the Rules made thereunder and further with an intent to evade payment. In the instant case as may be noted at the time the excisable goods were cleared the judgment of the Special Bench of the Tribunal had taken a view that the Notification would be applicable and that was the subsisting law. It is subsequent to the judgment in Grasim Industries of the Supreme Court, that the Supreme Court took the view that the view of the Tribunal could not be sustained. The Supreme Court also noted the reliance placed by the Tribunal on the earlier judgments as also the judgment of the Supreme Court in Astra Pharmaceuticals (P) Ltd. (supra). It would, therefore, be clear that none of the predicates as required for the application of the proviso, to apply the extended per of time to issue the show cause notice were satisfied. The learned Tribunal noted that the demands made for the period 25th May, 2000 to 9th August,2000 and the show cause notice was issued on 7th May, 2004 and the issue was only resolved in the year 2005 and, therefore, held that the extended period for issuing the show cause notice under the proviso was not applicable.

10. In our considered opinion it cannot be said

that the view taken was erroneous and consequently we find no merit in this Appeal which is accordingly dismissed. In the circumstances of the case there shall be no order as to costs.

(J.P. DEVADHAR, J.) **(F.I.REBELLO, J.)**